In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4679

OLYMPIA CANNING COMPANY, a corporation,
Plaintiff in Error

vs.

THE UNION MARINE INSURANCE COMPANY, LTD., a corporation,
Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief for Plaintiff in Error

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STATEMENT OF FACTS

Plaintiff brought this action to recover for the loss of goods under a contract of marine insurance aboard the S. S. "Rubiayat" on a voyage from Olympia via Tacoma to Seattle. The policy was

the standard form of voyage policy with operative words covering the risk of insurance, as follows:

"And touching the adventures and perils which the said company is contented to bear and does take upon itself in the voyage so insured as aforesaid, they are of the seas, men of war, fire, enemies, * * * jettisons, * * * barratry of the master and mariners and all other perils, losses and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject matter of this insurance or any part thereof."

The complaint alleges that goods of the value of $8,442 were shipped by plaintiff at Olympia, for transportation and delivery at Seattle, and that the insurance covered one-half the value of said shipment. The complaint contains the usual allegations to the effect that the goods were shipped on the vessel aforesaid and at the time said steamer departed from the port of Olympia on said voyage, she was in every respect seaworthy for her contemplated voyage, properly manned and equipped, and that during the course of said voyage, without any fault or negligence on the part of the plaintiff, said vessel foundered and together with said goods became a total loss. It is alleged that said loss was by reason of the perils specified in said policy of insurance; that due demand had been made from defendant and payment refused.

Defendant, answering the complaint, admitted the contract of insurance, the shipment of the goods for carriage from Olympia by way ports to Seattle, the seaworthiness of the vessel at the time of the commencement of the voyage when sailing from Olympia, the foundering of the vessel, and the total loss of the goods without fault or negligence on the part of the plaintiff; and, as an affirmative defense, the answer alleged that said steamer, after sailing from Olympia with plaintiff's goods on board bound for Seattle via Tacoma, called at the port of Tacoma and there took on additional cargo. That said additional cargo "was so improperly stowed on the vessel as to make her top-heavy, unstable, tender, and unfitted to continue the voyage." That shortly after leaving Tacoma, she capsized and sank. That the weather was fair and the sea calm and "that the capsizing and sinking of said vessel and the loss of said cargo was caused solely by her said top-heavy, unstable, tender and unfit condition and was not caused by perils of the sea or any other perils or risks covered by the contract of insurance mentioned in plaintiff's complaint."

Plaintiff demurred to this affirmative defense and its demurrer was overruled. (R. p. 21, 27.)

By stipulation, the case was tried to the judge without a jury.

The steamship "Rubiayat" was a small Sound steamer, 65 feet in length over all, 59 feet 5 inches between perpendiculars; 22 feet four inches in width, and 8 feet 4 inches in depth, with a net tonnage of 74 tons. The testimony shows that the vessel left Olympia with approximately sixty tons of cargo aboard and made her usual stop at Tacoma, where she took on approximately sixty additional tons of cargo, consisting of gypsum in sacks. She left the dock at Tacoma at about 6:30 p. m. In backing out of the waterway from her dock, she was passed by the steamer "Indianapolis" coming in. This latter steamer threw up a displacement wave of some six feet swell which struck the "Rubiayat" broadside, but without in any wise affecting the steadiness of the latter steamer. After backing out of the waterway and turning on her course to Seattle and proceeding at full speed for a distance of approximately two and one-half miles, the "Rubiayat," being then opposite the Terminal Dock in Tacoma, and having just passed the incoming steamer "Fulton," struck the tide-rips or cross-currents that frequently prevail at that point and

making a turn in her course for the purpose of meeting these cross-currents head on, the vessel first took a list to port and upon the helm being put hard over, recovered and immediately took a list to starboard and capsized. Neither the master nor any of the seamen on board the "Rubiayat" had noticed any tenderness or crankiness in the movements of the steamer prior to the time she struck these cross-currents and capsized. She had frequently carried as much or more cargo on previous trips although the stowage may have been somewhat different. (R. p. 61, 63, 64, 66, 68.) If there was any improper trim in the stowage on this trip, it was the result of bad judgment of the master who was admittedly experienced and capable. (R. 75.) These cross-currents or tide-rips are described by Captain Lovejoy, as follows:

"Q. Captain, are you familiar with the tides and currents in Commencement Bay?

"A. Yes, sir.

"Q. Just state to the Court what the currents there are, the action of the tide in Commencement Bay, referring to this Plaintiff's Exhibit 2.

"A. The currents as a whole are circular in motion in Commencement Bay, due to the tide ebbing down through by Point Defiance, and down through the West Pass, and the flood coming through the East Pass, or Vashon Island, so that at every flood there is a clockwise motion of the tides in the bay there at Tacoma, probably eighty per cent of the

time, except near slack water, that is, both slack high and low, the tides are flowing in one direction from about Sperry's Mill or the Terminal Docks, out towards Point Defiance, Old Town, out that way. The tide is a good eighty per cent of the time in the one direction, north. There is a break at the edge of this circle, which is about off the Terminal Docks, or near where the 'Rubiayat' was sunk, where there is three separate currents entering into it. One is this circular current, the other is the water from the water at Tacoma, where the regular boats land, and the other is a current from the river. It is uncertain as to just where that is. It will vary back and forth over an area of a mile or so, but those familiar with towing logs in there watch the boats come in. It is very conspicuous. This large circle in the bay, and a boat will go at least three or four miles out of the shortest route between Point Defiance and the mills in making the mills, due to this tide, and will do it even though to all appearances there should be a fair tide.

"Q. What effect does the current coming out of the waterway, and this river—is that what you have just described?

"A. Yes, sir. It would be uncertain as to just what it would be. There would be cross-currents, and a tendency to whirlpools. While they are not very strong they are noticeable to anyone steering a boat through them?

"THE COURT: What effect does it have on the boat?

"A. To make her either loose or steer crooked; that is, she would tend to deviate from her course when meeting this, or else list over a little.

"Q. Of course you are familiar with the construction of the 'Rubiayat', her design, etc?

"A. Yes, sir.

"Q. And you are familiar with the manner in which she was loaded on the day she foundered?

"A. Yes, sir, I think I am.

"Q. Considering the fact that she made her turn in the waterway and encountered the displacement waves from the 'Indianapolis' without any serious effect on her, and that she proceeded approximately two miles thereafter under full speed without indicating any crankiness, what would you say would be at least one of the contributing factors to the sudden list and foundering of this vessel?

"MR. SHORT: I object to that upon the ground that it calls for the conclusion of the witness. The witness was not present aboard the vessel at the time, and any information he can have is purely hearsay.

"MR. BOGLE: I am not asking him for the fact; I am asking him as an expert, from his knowledge of the tidal conditions in that harbor, and the admitted facts with reference to this vessel.

"THE COURT: Let it go in the record. You may answer.

"A. She undoubtedly, or in my mind met with factors other than wholly the loading of the vessel. That is, she met currents which caused her to take a list there, which was the real start of her capsizing." (R. p. 50, 51.)

The incidents immediately connected with the capsizing are described by Capt. George J. Ryan, master of the "Rubiayat" at the time of the accident, as follows:

"Q. (By the Court): What was the condition of the water just before the vessel listed?

"A. It was perfectly calm.

"Q. It was perfectly calm?

"A. Yes, sir.

"Q. No current or waves of any sort?

"A. There is always that current there.

"Q. What current?

"A. The cross-current from the river coming in at that point.

"Q. What was the condition of that cross-current there?

"A. Well, it is really hard to see the condition of the current.

"Q. How is that?

"A. It is really hard to see just how the tide comes, from up in a pilot house on a boat. Sometimes you can see it boiling.

"Q. Did you run into that before it listed?

"A. Yes, sir.

"Q. Just how did you operate then.

"A. Well, you always turn your boat to meet the current, to head into it, just like you would head into a violent storm.

"Q. When you ran into that current you listed?

"A. Yes, sir.

"Q. Listed one way, and then the other way?

"A. Yes.

"Q. And then sunk?

"A. And then went over on her second list.

"Q. How big was this current, how did it operate upon the surface of the water?

"A. On the surface of the water it looks like a small whirlpool.

"THE COURT: All right.

"MR. BOGLE: May I ask the Captain a question.

"THE COURT: Yes.

"Q. (By Mr. Bogle): Do these currents always operate on the surface or are any of them down below the surface?

"A. Well, they operate down below also, but we do not know how deep.

"Q. You were drawing how much water?
"A. About eight feet; about eight feet, six inches.
"MR. BOGLE: That is all.
"THE COURT: As I view it, that is the determining matter in this case, this cross-current, so far as my mind is concerned."

(Argument of counsel.)

"THE COURT: I will frankly say to you gentlemen now, that I believe the cross-currents had something to do with this boat sinking. I will take the matter under advisement." (R. p. 56, 57.)

The trial judge, after the testimony was completed, made the following statement on the material question in the case as viewed by him at the time:

"THE COURT: I think the thing that will determine the case will be this: In my judgment, in my recollection of the case as heretofore submitted; did the currents that were created, as testified to by the last witness on the stand, did they create such a condition as to be a peril within the provisions of the policy. This boat having left the wharf and ran about two miles and a half into the place where this witness says these currents were, did the condition of those currents, the operation of them upon the vessel, create a peril within the policy. That is about the only thing in this case in my judgment." (R. p. 55.)

And after Captain Ryan was recalled at the request of the court and had made the statement above quoted with respect to the effect of the current at the time of the accident, the court said:

"As I view it, that is the determining matter in this case, this cross-current, so far as my mind is concerned. I will frankly say to you gentlemen now that I believe the cross-currents had something to do with this boat sinking. I will take the matter under advisement." (R. p. 57.)

It is agreed that the value of the goods lost was $8,442, and the amount recoverable by the plaintiff, if it is found entitled to recover, is $4,221, with interest from September 29, 1923.

ARGUMENT

The policy provides that the adjustment and settlement of losses thereunder shall be made in conformity with the laws and customs of England.

I

The Implied Warranty of Seaworthiness Was Fully Complied With

It is specifically admitted in the answer that the vessel was entirely seaworthy at the time the insured goods were loaded on board and when the policy attached, and when the vessel started on her voyage from Olympia.

The doctrine is well settled both in this country and in England that the implied warranty of sea-

worthiness is complied with if the vessel is seaworthy at the inception of the voyage.

"There is an implied warranty that the vessel upon which the goods are loaded is seaworthy at the inception of the voyage."

Arnould on Marine Insurance (9th Ed.), Sec. 686.

"Seaworthiness at the inception of the voyage is all that is required, and there is no implied warranty that the vessel shall remain seaworthy during the voyage or at intermediate ports."

Arnould on Marine Insurance, Sec. 691.

Again—

"It is an established principle in this country, to which effect is given in Section 55 of the Marine Insurance Act, 1906, that, supposing the vessel, crew, and equipment to have been originally sufficient, and a captain to have been provided with competent skill, the underwriter is liable for any loss proximately caused by the perils insured against although it may have been remotely occasioned by the negligence or misconduct (not amounting to barratry) of the captain or crew, whether such negligence or misconduct consists in omitting some act which ought to be done or doing an act which ought not to be done in the course of navigation. The law is the same in the United States."

Arnould on Marine Insurance, Sec. 798.

The rule is stated in practically the same language in *Joyce on Insurance*, (2nd Ed.) Vol. 4, Sec. 2167.

Inasmuch as it is admitted that the vessel was seaworthy at the inception of the voyage and the implied warranty, therefore, fully complied with, the questions arising in the case are to be considered and determined irrespective of any warranty of seaworthiness.

II

The Proximate Cause of the Loss of Plaintiff in Error's Cargo Was the Foundering of the Ship and Was a Peril Covered by the Policy in Suit

Defendant contends, however, that the loss of the plaintiff's goods was not a loss through a peril of the sea, or other perils to which they were exposed on the voyage, within the meaning of the policy; but that the loss was caused by the alleged unseaworthy condition of the vessel by reason of the bad stowage of the goods taken on at Tacoma, and that this alleged unseaworthy condition of the vessel was the proximate cause of the loss. We contend on the contrary that the facts as disclosed by the testimony and as specifically found by the trial judge in his findings of fact, clearly show a loss by a marine peril and entitle the plaintiff to a recovery as a matter of law.

It is admitted that the vessel upon which plaintiff's goods were shipped foundered in the course of the voyage, and that its goods were totally lost as a result thereof. That the "sinking" or "foundering" of a vessel is a peril of the sea seems to us too plain to admit of argument.

See *Arnould on Marine Insurance*, (9th Ed.) Sec. 812.

The argument that the negligence or bad judgment of the master, if such has been shown, in the manner in which he distributed the cargo loaded aboard the vessel at Tacoma, whereby she is alleged to have become top heavy and unstable, is to be considered the proximate cause of the loss of the plaintiff's goods, is clearly untenable.

In the case of *Aetna Insurance Co. v. Sacramento & Stockton S. S. Co.*, 273 Fed. 55, 59, this court expressly held that where a vessel foundered in the course of a voyage, it was no defense to an action on an insurance policy to prove that the vessel at the time was unseaworthy, and that her foundering was caused by her unseaworthy condition, unless there was further proof that the unseaworthy condition was known to the owner and his conduct in sending her to sea amounted to a fraud.

The policy in that case was a time policy, and governed, as is the instant case, by English law and practice; and there, as here, no implied warranty of seaworthiness was involved. It was pleaded by the defendant that the vessel was unseaworthy at the time she foundered, with privity of the owner, and that the foundering was caused by her unseaworthiness; and testimony was offered to prove that the vessel foundered because of her unseaworthy condition. This testimony was rejected as constituting no defense—the foundering being held to be the proximate cause of the loss. This was but a recognition of the well settled rule that, when construing insurance policies, the proximate and not the remote cause of the loss will alone be considered; and that where goods are lost by the foundering of the vessel in which they were being shipped, the proximate cause of the loss is the sinking of the vessel, and the consequent contact of seawater with the goods. The courts will not look to the cause of the foundering—the remote cause of the proximate cause of the loss—unless there is a question of breach of warranty or of wilful and fraudulent misconduct upon the part of the owner.

The English rule in this respect was clearly settled by the early case of *Dixon v. Sadler*, 5 M. & W.

405, 151 Eng. Rep. 172. The facts in that case are very analogous to the facts in the case at bar, in so far as the principle of law under discussion is concerned. The ship "John Cook" was insured against perils of the sea on a voyage from Rotterdam to Sunderland. She was admittedly seaworthy at the inception of the voyage. On arrival at a point approximately four miles short of her destination, the master caused the crew to throw overboard a large part of the vessel's ballast, having in view the saving of time in removing ballast when he reached destination. After the ballast was overthrown and before the vessel reached destination, she encountered rough water which caused her to upset and subsequently sink and become a total loss. In an action on the policy the defendant pleaded that the vessel was not lost by perils of the sea; and, by a special plea, further set up:

"That the said wrecking, breaking, damaging, and injuring the said vessel, and the loss of the same by the perils of the sea as in the said first count mentioned, was occasioned wholly by the wilful, wrongful, negligent, and improper conduct (the same not being barratrous) of the master and mariners of the said ship, whilst the said ship was at sea as in the said first count mentioned, and before the same was wrecked, broken, damaged, injured, or lost as therein mentioned, to-wit, on the 19th of May, 1838, by wilfully, wrongfully, negligently, and improperly (but not barratrously)

throwing overboard so much of the ballast of the said ship, that by means thereof she became and was top-heavy, cranky, unfit to carry sail, and wholly unseaworthy, and unfit and unable to endure and encounter the perils of the sea which she might and would otherwise have been able to have safely encountered and endured, and by means and in consequence of the said wilful, wrongful, negligent, and improper (but not barratrous) conduct of the said master and mariners, the said ship became and was wrecked, broken, damaged, injured, and lost by perils of the sea, which perils, but for the said conduct of the said master and mariners, she could and would have safely encountered and overcome without being so wrecked, broken, damaged, injured, and lost as in the said first count is mentioned."

The verdict of the jury was entered in favor of the defendant upon this special plea and plaintiff thereupon moved for judgment *non obstante verdicto.*

It will be observed that the legal question presented in that case is identical with the question presented in the case at bar. In both cases it was alleged as a defense that, by the negligent, careless, or improper act of the master and mariners, after the voyage had been entered upon, the vessel was rendered tender, unfit to encounter the ordinary perils of the sea and unseaworthy—in the English case by throwing overboard ballast and in the instant case by taking on and improperly stow-

ing additional cargo. After being put in this condition by the negligent acts of the master and mariners, and without fault on the part of the insured in either instance, the vessel encountered conditions of the sea which in each instance she would have withstood successfully except for the unfit condition of the vessel by reason of being unstable and unseaworthy. In the case cited, the plea which was sustained by the verdict of the jury expressly alleged that except for the said conduct of the master and mariners, the vessel could and would have safely encountered and overcome the seas subsequently encountered without being wrecked, injured, or lost. In the case at bar, the court has assumed that except for the method of loading and stowing cargo at Tacoma, the vessel would have safely overcome the conditions encountered in the tide-rips and cross-currents described by the witnesses and which caused her to capsize. In the case cited, Mr. Justice Parke said:

"If the crew had not removed the ballast, the ship would most likely have stood the squall. It was objected at the trial that this was not a risk which the underwriters had undertaken to indemnify against. * * *

"The question depends altogether upon the nature of the implied warranty as to seaworthiness, or mode of navigation, between the assured and the underwriter, on a time policy. In the case of an

insurance for a certain voyage, it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounted the ordinary perils of the voyage insured, at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk. * * * And if the voyage be such as to require a different complement of men, or state of equipment, in different parts of it, as, if it were a voyage down a canal or river, and thence across to the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it. But the assured makes no warranty to the underwriters that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage; and their negligence or misconduct is no defense to an action on the policy, where the loss has been immediately occasioned by the perils insured against. This principle is now clearly established by the cases (citing a number of English cases); nor can any distinction be made between the omission by the master and crew to do an act which ought to be done, or the doing an act which ought not, in the course of the navigation. It matters not whether a fire which causes a loss be lighted improperly, or, after being properly lighted, be negligently attended; whether the loss of an anchor, which renders the vessel unseaworthy, be attributable to the omission to take proper care of it, or to the improper act of shipping it, or cutting it away; nor could it make any difference whether any other part of the equipment were lost by mere neglect, or thrown away or destroyed, in the exercise of an improper discretion, by those on board. If there be any fault in the

crew, whether of omission or commission, the assured is not to be responsible for its consequences. * * *

"The great principle established by the more recent decisions is, that, if the vessel, crew, and equipment be originally sufficient, the assured has done all that he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew; and this principle prevents many nice and difficult inquiries, and causes a more complete indemnity to the assured, which is the object of the contract of insurance. If the case, then, were that of a policy for a particular voyage, there would be no question as to the insufficiency of the plea; and the only remaining point is, whether the circumstances of this being a time policy makes a difference."

The case was again argued and the decision of the court announced by Chief Justice Tindal in 8 M. & W., 895. After stating the pleadings, the court says:

"The question, therefore, in substance becomes this: whether the throwing the ballast overboard by the master and crew (which must be considered as their voluntary act, and also a negligent and improper act), whereby the ship became unseaworthy, excuses the underwriter. It is obvious that such an act (all unlawful motive being excluded by express averment) may be attributable to an error or defect in judgment, both as to the fact of discharging the ballast at all, and further, as to the exact extent to which it was actually discharged; and it seems difficult, on principle, to hold that the underwriter shall be excused where the loss is occasioned by the mere want of judgment or the

negligence of the master and mariners—which occurred in this particular case—and that he shall not be also held to be excused in every case, where the loss can be traced to mistake of judgment, or an act of carelessness or negligence in the ordinary navigation of the vessel; in which latter cases the loss is confessedly held to fall within the meaning of perils of the sea.

"But without entering into a further discussion of the principle, we think, upon the later authorities, the rule is established, that there is no implied warranty on the part of the assured for the continuance of the seaworthiness of the vessel, or for the performance of their duty by the master and crew during the whole course of the voyage."

Judgment was accordingly entered for the plaintiff on the policy. This decision has been recognized as standard authority in the law of England upon marine insurance since the date of its rendition.

Another case directly in point upon the principle involved is that of *Dudgeon v. Pembroke*, L. R. 1 Q. B. Div. 96; L. R. 2 App. Cas. 284; 3 Asp. Mar. L. Cases 393.

In this case, a vessel was insured under a time policy, and the court held that under the English law, there was no implied warranty of seaworthiness in such policy. It was argued there, as it has been in the case at bar, that the loss of the vessel was caused by her unseaworthy condition at the

time of the accident and, therefore, not by a peril insured against.

In that case, by reason of the unfit condition of the vessel during one of her voyages, she was driven ashore by the force of the wind and waves and finally broke up and went to pieces. In that case, the question presented to the House of Lords was whether the underwriter was liable under the ordinary marine insurance policy for a loss immediately and directly caused by the sea but resulting wholly from the unseaworthy condition of the vessel, there being in the case no express or implied warranty of seaworthiness. Lord Penzance, in delivering the opinion which prevailed in the House of Lords, said:

"In discussing such a question it must be assumed, as it was admitted by the appellant that it should be, for the sake of argument, that the vessel was not seaworthy, and that her want of seaworthiness caused her to be unable to encounter successfully the perils of the sea and so to perish. The question therefore is in substance the same as that raised by the sixth plea, or rather so much of it as the jury found to be proved, namely that the 'vessel sailed from London in a wholly unseaworthy condition on the voyage on which she was lost,' and that the ship 'was lost as alleged by reason of such unseaworthiness.' For this plea must be understood to mean not that the vessel did not perish immediately by the action of the winds and waves (if it did it was certainly not sustained by the

facts), but that the loss by these perils of the sea was brought about by the vessel's unseaworthiness. It will at once occur to your Lordships upon the raising of such a question that in regard to a voyage policy as to a time policy, if a loss proximately caused by the sea, but more remotely and substantially brought about by the condition of the ship, is a loss for which the underwriters are not liable, then quite independent of the warranty of seaworthiness which applies only to the commencement of the risk the underwriters would be at liberty in every case of a voyage policy to raise and litigate the question whether at the time the loss happened the vessel was by reason of any insufficiency at the time of her last leaving a port where she might have been repaired, unable to meet the perils of the sea, and was lost by reason of that inability. If such be the law, my Lords, the underwriters have been signally supine in availing themselves of it, for there is no case that I am aware of except those to which I have referred, in which anything like such a defence as this has been set up. The materials for such a defence must have existed in countless instances, and yet there is no trace of it in any case which has been brought to your Lordships' notice, still less any decision upholding such a doctrine. * * *"

"In the total absence then of all authority, and in the fact that this defense is a new one, I find sufficient reason for advising your Lordships, not now for the first time to sanction a doctrine which would entirely alter the hitherto accepted obligations between underwriter and assured.

"It was said by one of the learned judges in the Exchequer Chamber that the unseaworthiness of the ship at the commencement of the voyage which really caused the loss is a fact the consequences of which are imputed to the assured and were to be borne by him and not the underwriters. But the

question as it seems to me is not what losses ought in the abstract to be borne by the assured as being imputable to him or his agents on the one hand, or by the underwriters as being caused by the elements on the other hand, but what losses they have mutually agreed should be borne by the underwriters in return for the premium they have received. These losses are in the contract of the insurance amongst others declared to be all losses by perils of the sea. A long course of decisions in the courts of this country have established that *causa proxima non remota spectatur* is the maxim by which these contracts of insurance are to be construed, and that any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it. It is I conceive far too late for your Lordships now to question this construction of the underwriters' obligation, if indeed you were disposed to do so."

After referring to the case of *Thompson v. Hopper*, (6 E. & B 172), and pointing out that that decision was based on the fact that the shipowner himself knowingly and wilfully sent the ship to sea in an unseaworthy state, he proceeded:

"It is only necessary to observe upon that case that the knowledge and wilful misconduct of the assured himself was an essential element in the decision arrived at. There is no case that warrants your Lordships in going further, and on the other hand it is easy to see that the arguments employed in this case, if sanctioned by judicial decision, would result in relieving the underwriters from many other losses to which they have hitherto been liable. For instance, the assured has always been

held protected from loss from the perils insured against, though that loss was brought about through the negligence of his captain or crew. Now, the captain has the entire control of the vessel in respect of repairs in foreign ports as of everything else, and if the sixth plea in this case were held to be sufficient, without proof of the shipowner's knowledge and wilfulness, the result would be that whenever the captain failed in his duty in fitly repairing the vessel in a foreign port, and the loss, though caused by perils of the sea, could be traced to the ship's defective condition, the assured would lose the benefit of his policy. Such a doctrine once established would extend equally to the negligent conduct of the ship in the course sailed by her, or her careless management in emergency, or the absence of reasonable and proper exertion on the part of the captain or crew."

We respectfully submit that the case at bar is not distinguishable in principle from *Dudgeon v. Pembroke*, *Dixon v. Sadler*, or *Aetna Ins. Co. v. Sac. & S. S. S. Co.*, *supra*, and as the policy itself provides that loss and liability shall be settled in accordance with English law and usage, the plaintiff in the case was clearly entitled to recover.

The case of *Dudgeon v. Pembroke* was cited by the Supreme Court of the United States in *H. E. & P. Co. v. Philippine Islands*, 219 U. S. 17, as correctly laying down the doctrine that under insurance policies, the courts refuse to look behind the immediate cause of the loss to remoter negligence of the insured.

In the case at bar, the goods of the plaintiff were neither lost nor damaged by the loading of the vessel at Tacoma, whether that loading was improper or not. They were lost solely by contact with the sea, caused by the capsizing of the vessel. This was the immediate cause of their loss, or, as stated by the courts, the *causa proxima.* The fact that the capsizing may be traceable, either in whole or in part, to the negligent act of the master and seamen in the manner of loading and trimming the vessel at the intermediate port of Tacoma is wholly immaterial, inasmuch as it is at most an indirect and remote cause and not the immediate, direct, and proximate cause of the loss.

In *Walker v. Maitland,* 5 B. & A. 171; 106 Eng. Rep. 1155, the rule is again clearly stated. In that case, a small schooner ran ashore, due solely to the fact that the crew on watch negligently went to sleep so that there was no one directing the course of the schooner. Mr. Justice Bayley said:

"It is the duty of an owner to have the ship properly equipped and for that purpose it is necessary that he should provide a competent master and crew in the first instance. But having done that, he has discharged his duty and is not responsible for their negligence as between him and the underwriter."

And Justice Holroyd, in the same case, said:

"The rule of law is that *proxima causa non remota spectatur*, and here the proximate cause of the loss, was a peril of the sea. The question is whether the underwriters are liable for a loss proceeding directly from a peril of the sea but remotely from the negligence of the crew. * * * It is sufficient if the owners provide a master and crew generally competent; there is no implied warranty that such a crew shall not be guilty of negligence."

The same rule is imposed in the English Marine Insurance Act of 1906. Section 55 (2a) of that act provides:

"The insurer is not liable for any loss attributable to the wilful misconduct of the assured but unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against even though the loss would not have happened but for the misconduct or negligence of the master or crew."

Also in the case of *Trinder, Anderson & Co. v. T. & M. Ins. Co.*, decided in 1898, 67 L. J., Q. B., N. S. 666; 8 Asp. Mar. Cas. 273, the authority of the cases of *Dixon v. Sadler*, and *Dudgeon v. Pembroke* was re-affirmed as the established law of England. In that case, the vessel had been stranded by the negligent navigation of the master who was also part owner of the vessel. Defendant contended that the stranding in such conditions was not a peril of the sea within the policy. The court re-

affirmed the doctrine of the cases previously cited and held that the stranding was the immediate cause of the loss or the *causa proxima* and negligence of the navigating officers, of which the stranding was a consequence, was a remote cause.

The principle is illustrated by the case of collision between two vessels as a result of the fault or negligence of the master and mariners of the insured vessel. It was for a long time contended that such a loss was not a peril of the sea and covered by the ordinary marine insurance; but that question has long since been set at rest both in England and in America. The leading English case is that of *Wilson v. Xantho*, 12 A. C. 503, decided by the House of Lords in 1887. Lord Herschell, in moving for judgment in favor of the assured in the House of Lords, said:

"I think it clear that the term perils of the sea does not cover every accident or casualty which may happen to the subject matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure

an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities or by the common understanding. It is beyond question that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category. Indeed, I am aware of only one case which throws a doubt upon the proposition that every loss by incursion of the sea due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body which penetrates it and causes a leak, is a loss by perils of the sea. * * * Now I quite agree that in a case of a marine policy the *causa proxima* alone is considered. If that which immediately causes the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel."

And referring to the older case of *Woodley v. Mitchell*, which had held to the contrary, his Lordship said:

"I am unable to agree in the view that a disaster which happens from the fault of somebody can never be an accident or peril of the sea; and I think it would give rise to distinctions resting on no sound basis if it were to be held that the exception of perils of the sea in a bill of lading was always excluded when the inroad of the sea which

occasioned the loss was induced by some intervention of human agency. Taking the case which I put in the course of the argument, of a ship which strikes upon a rock and is lost because the light which should have warned the mariner against it has become extinguished owing to the negligence of the person in charge. Why should this not be within the exception, whilst a similar loss arising from a vessel coming in contact with a rock not marked upon the chart admittedly would be? And what special distinction is there between this latter case and that of a vessel foundering through collision with a ship at anchor left at night without lights? For these reasons I have arrived at the conclusion that the case of Woodley v. Mitchell cannot be supported."

In the same case, Lord Bramwell said:

"It was admitted by the plaintiffs that the vessel sank owing to damage received in a collision. It was admitted by the defendants that that collision was not the result of unavoidable accident, i. e., the winds and waves or other natural causes." " * * * Was it by a peril of the sea that the defendant ship foundered? The facts are that the sea water flowed into her through a hole and flowed in such quantities that she sank. It seems to me that the bare statement shows that she went to the bottom through a peril of the sea. If the hole had been simply from being a piece of bad wood, a plank starting, or a similar cause, it would be called a leak, and no one would doubt that she foundered from a peril of the sea. Does it make any difference that the hole was large and occasioned by collision? I cannot think it does. It is admitted that if the question had arisen on an insurance against loss by perils of the sea, this would have been within the policy a loss by perils of the sea." * * *

"The argument is that wind and waves did not cause the loss, but negligence in someone. But surely if that were so, a loss by striking in calm weather on a sunken rock not marked on the chart would not be a loss by perils of the sea within the bill of lading, or striking on a rock from which the light had been removed, or an iceberg, or a vessel without lights. I cannot bring myself to see that such cases are not losses by perils of the sea. Is not the chance of being run against by a clumsy rider one of the perils of hunting? It would be strange if an underwriter on cargo suing in the name of the cargo owners on a bill of lading, should say, 'I have paid for a loss by perils of the sea and claim on you because the loss was not by perils of the sea.' The Court of Appeals with great respect argued as though the collision caused the loss. So it did in a sense. It was *causa sine qua non*, but it was not the *causa causans*. It was *causa remota*, but not *causa proxima*. The *causa proxima* of the loss was foundering."

In *Redman v. Wilson*, 12 M. & W., 476, a ship insured on a voyage out and home, "had been seaworthy at the commencement of the risk, but at Sierra Leone had been so unskilfully loaded by the native lumpers, that on commencing her voyage home, she was found unable to keep the sea, and was run ashore in order to prevent her sinking in the Leone river. The court, upon the same principle as in the previous cases, held the underwriters liable for the loss.

Arnould (9th Ed.) p. 997.

And *Gibson v. Burnand*, L. R. 4 C. P. 117, where the crew negligently left open the sea cocks or valves, through which water entered the ship, and caused the loss.

The *Ionides* case (*Ionides v. N. W. Assn.*, 32 L. J. C. 173) also illustrates the principle that the court will not look beyond the efficient, proximate cause of the loss. The policy was upon cargo, and contained a clause "warranted free from capture," etc., and "free from all the consequences of hostilities, riots, and commotions." A lighthouse had been constantly maintained at Cape Hatteras, which was relied upon by masters in navigating around the Cape; but at the time of the accident involved in the action, the Confederate authorities had put out this light for a hostile purpose. As a consequence of the absence of this light, the ship ran ashore and was lost, a part of the goods being also lost in the stranding, and a part seized by the Confederate military forces. The court said it would "take as a fact for the purpose of the judgment that if there had been a light on Cape Hatteras, the captain could have seen it and could have put his ship about, and if he could have seen it and could have put his ship about, that the ship would not have been lost in the manner in which it was." Not-

withstanding the broad language of the warranty, the court held that the stranding was not a consequence of hostilities.

The case of *Orient Insurance Company v. Adams*, 123 U. S. 67, is also clear on this subject. There a steamer navigating upon the Ohio River was insured against the perils of the river. She was temporarily tied up at a dock while certain repairs were made to her machinery. The master of the vessel ordered the lines let go without making inquiry to ascertain whether the vessel had steam or not,—as a result of which the vessel, having insufficient steam for navigation, drifted with the current of the river a short distance over some falls and was damaged. The steamer being without steam was, of course, unseaworthy to navigate the river and as a result of such unseaworthy condition and by the normal and natural current of the river, was carried over the falls. The court held that the proximate cause of the loss was the sinking of the vessel as a result of the damage received by being swept over the falls by the current of the river, the negligence of the master being only the remote cause of the loss. The trial court instructed the jury as follows:

"Where a loss under a policy of insurance such as the one in suit happens from the perils of the river, it is not a defense to the insurance company that the remote cause of the loss was the negligence of the insured or his agents. * * * The mere fault or negligence of the captain of the vessel by which the 'Alice' was drifted into the current and drawn over the falls will not constitute a defense to the company, unless the jury should be satisfied that the captain acted fraudulently or wilfully, with design in so doing. * * * If the proximate cause of the loss was the stranding of the vessel, this was covered by the policy and the defendant is not relieved from liability by showing that the loss was remotely ascribable to the negligence of the captain or the other officers or employees."

The Supreme Court, in overruling exceptions to these instructions, said:

"We do not perceive anything in these instructions of which the insurance company can rightfully complain. The court proceeded upon the ground that if the efficient and, therefore, the proximate cause, of the loss was the peril of the river, the company could not escape liability by showing that the loss was remotely caused by mere negligence in not ascertaining before giving the signal to let the vessel go, that she had steam enough for her proper management. The court committed no error in so ruling."

It will be noted that in the above case there was nothing unusual, unavoidable, or not to be anticipated in the action of the water of the river which carried this vessel over the falls. A vessel without

steam cast into the current of the river will normally, naturally, and inevitably drift with that current and over any falls that exist in the river. That the loss in that case was in a sense attributable to the action of the master in having the vessel cast off into the current without any steam is, of course, perfectly clear. The court, however, held that the loss of the vessel was caused by the sinking, as a result of the damages sustained in going over the falls, and that that was the proximate cause of the loss and was a peril of the river notwithstanding the fact that the drifting of the vessel over the falls was an inevitable consequence of the action of the master in casting her adrift into the current without steam.

So, in *Crescent Ins. Co. v. Vicksburg, etc., Co.*, 69 Miss. 208, 13 So. Rep. 254, the policy was on cargo of cotton and worded identically as in the case at bar. In transferring cotton bales to a connecting boat, by the negligence of the crew, the boat listed and a portion of the cotton was thrown into the river and damaged. Applying the principle of *causa proxima*, the court said:

"The injury to the cotton by water of the river into which it was thrown by mishap of the boat was a peril of the river. If it be true that the careening of the boat resulted from negligence in unloading,

the insurer is liable. * * * The immediate cause of injury to the cotton was water of the river. That it got into the river because of some carelessness or unskillfulnes of those engaged in unloading does not relieve the insurer from liability. To relieve from liability, there must be want of good faith and honesty of purpose. Where a peril of the sea is the proximate cause of the loss, the negligence which caused the peril is not inquired into."

The same general principle is stated by this court in *American Hawaiian S. S. Co. v. Bennett*, 207 Fed. 510, as follows:

"Assuming that there was such negligence * * * it was, we think, clearly a loss against which the owner was insured by the policy held by it. 'A policy of insurance against perils of the sea covers a loss by stranding or collision although arising from the negligence of the master or the crew, because the assurer assumes to indemnify the assured against losses by particular perils and the assured does not warrant that his servants will use due care to avoid them.' Liverpool, Etc., Co. v. Ins. Co., 129 U. S. 397. * * * In 26 Cyc. 660, it is said, 'The general rule is that where the immediate cause of a loss is a peril of the sea insured against, the underwriters are liable notwithstanding such loss would not have occurred except for the negligence of the insurer or that of the master, crew, or other agents or servants', citing a large number of cases. That the unexpected striking and stranding of the vessel in tidal waters is a peril of the sea, does not admit of question. Fletcher v. Englis, 2 B. & Ald. 315; Letchford v. Holdon, 5 Q. B. D. 538."

In the case at bar, the most that can be said under the testimony is that if the cargo put on the

vessel at Tacoma had been loaded somewhat differently, the vessel might have withstood the action of the cross-currents or tide-rips without capsizing. The effect of such cross-currents upon the navigation of small vessels the size of the "Rubiayat" varies so much that it is impossible for anyone to say with any degree of certainty what would have happened if the vessel had been loaded or trimmed differently. These currents or rips, as shown by the testimony, sometimes extend down to a depth of eight or more feet and necessarily endanger the navigation of small steamers. Sometimes they are barely perceptible on the surface while at other times they are small whirlpools. The steamer changed her course when she struck these currents with a view to heading into the current. It is possible or even probable that the accident to the steamer was caused solely by the combined effect of these cross-currents, the action of the master in changing his course, and his action in throwing his helm hard over at the time the vessel took the first list to port. Apparently this action of the helm caused the vessel to react from her list to port into an extreme list to starboard, and that was accentuated by these disturbing cross-currents through which he was passing, and the turn-

ing movement of the steamer, and she capsized as a result. Whether she would have capsized if she had been loaded or trimmed somewhat differently is merely a matter of conjecture. It seems to us that the contention put forth in this case that this capsizing of the vessel under these conditions was not a peril of the sea and, therefore, that the loss of these goods did not come within the terms of this policy is wholly untenable. The plaintiff here is not the owner of the vessel but the shipper of cargo, and while it is true that the shipper in a policy on goods is bound by the implied warranty of seaworthiness at the inception of the voyage to the same extent as is the owner of a vessel in a policy on a vessel, yet it would seem to be an exceedingly harsh doctrine which would deprive the shipper of the protection of his policy notwithstanding his precaution in seeing that the vessel upon which his goods were shipped was initially seaworthy, because of the subsequent negligent or careless act of the master of the ship over whose conduct the shipper has no control and for whose actions he is in no way responsible.

The purpose of marine insurance as between a shipper of cargo and the underwriter is to afford complete protection to the shipper against all of

the marine risks incident to the voyage, provided only the vessel was seaworthy at the inception of the voyage and the attaching of the policy. The policy, by its express language, covers not only perils of the sea, strictly so-called, fire and barratry, but also "all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage" of the goods insured.

When a seaworthy vessel leaves port on her voyage, there are certain risks inevitably incident to the voyage. One is that the vessel may encounter a storm that will break her up and drive her ashore. In such case, the policy is intended to protect the shipper. She may run onto a sunken rock and sink, or she may, with or without the negligence and carelessness of her navigators, come into collision with another vessel and sink, or by the carelessness and negligence of her navigators, she may run on shore and result in a total loss. In all of these instances it is admitted that the policy covers the risk. There is also the danger that vermin may be aboard the ship and may gnaw a hole into a pipe, letting seawater into the ship and thereby damaging or destroying the goods. The courts have held that this loss is one covered by the policy.

Where a vessel enters upon a voyage which contemplates her stopping at intermediate ports, it is known that she either will or may take on or discharge cargo at these intermediate ports, and that the amount of cargo taken on and the manner in which it will be stowed in the vessel are matters which depend upon the judgment of the master in charge. There is, of course, always the risk that he may show bad judgment in the manner in which these goods may be stowed on the vessel, resulting in the vessel being unstable and out of trim, and which may ultimately cause the steamer to be unable to withstand the action of the sea on some part of the remaining voyage. That is a risk necessarily incident to shipping on the water. Why should it not be considered as covered by the broad language of this policy, which, as stated, covers not only perils of the sea technically but "all other perils, losses and misfortunes" which shall come to the damage of the goods?

The lower court having found that the implied warranty of seaworthiness had been fully complied with at the inception of the voyage and that the vessel at the time of sailing from Olympia was fully manned and equipped to successfully encounter the usual and ordinary incidents of such a voy-

age, further found that said vessel was unskilfully stowed at the intermediate port of Tacoma so as to render her top-heavy and unstable, and that in such top-heavy and unstable condition, she was unable to successfully encounter the tidal and cross-currents in Tacoma Harbor. And the lower court held as a conclusion of law that such tidal and cross-currents were not a peril of the sea within the policy in suit.

The error of the lower court, we think, is perfectly apparent. Instead of considering the proximate cause of the loss, the lower court confined its findings and conclusions to the remote cause of said loss. If plaintiff in error's contention that the foundering of the vessel was the proximate cause of the loss of its goods, is sound, then the lower court's findings and conclusions with reference to the prior negligent stowage is entirely immaterial as, at most, such negligence was a remote cause in the chain of circumstances leading up to the ultimate loss of the plaintiff in error's goods. As was said by Lord Bramwell in *Wilson v. Xantho, supra*:

"The Court of Appeals with great respect argued as though the collision caused the loss. So it did in a sense. It was *causa sine qua non*, but it was not the *causa causans*. It was *causa remota*, but not

causa proxima. The *causa proxima* of the loss was foundering."

And, as said by Justice Holroyd in *Walker v. Maitland, supra*:

"The rule of law is that *proxima causa non remota spectatur*, and here the proximate cause of the loss, was a peril of the sea."

So, in the case at bar, the immediate proximate cause of the loss was the foundering of the ship and such cause undoubtedly was a peril of the sea and, therefore, within the coverage of the policy, and the courts will not look beyond such cause to determine the remote cause leading up to said foundering.

The case is squarely within the language of Lord Penzance, in *Dudgeon v. Pembroke*, that "any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it."

With all due respect to the trial court, we submit that said court did not consider or pass upon the point which was really involved in this litigation. It never determined the proximate cause of the loss but confined its inquiry entirely and exclusively to the remote cause or causes leading up to the proximate cause of said loss.

We respectfully submit that the seaworthiness of the vessel at the inception of the voyage being admitted and the proximate cause of the loss of plaintiff in error's goods being due to the foundering of the vessel, the remote cause or causes leading up to said foundering are entirely immaterial and that the decree of the lower court should be reversed and judgment entered in favor of the plaintiff in error.

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